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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

TODD WHITE, Plaintiff and Appellant, v. CITY OF SAN DIEGO et al., Defendants and Respondents.	D076700 (Super. Ct. No. 37-2019-00020680-CU-BT-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Kenneth J. Medel, Judge. Affirmed.

Todd White, in pro. per., for Plaintiff and Appellant.

Mara W. Elliott, City Attorney, George F. Schaefer, Assistant City Attorney, and Valerie Silverman Massey, Deputy City Attorney, for Defendants and Respondents.

Plaintiff Todd White appeals from a judgment of the superior court dismissing the action without prejudice after the court sustained without leave to amend a demurrer brought by defendants City of San Diego (City) and City library director Misty Jones (together, Defendants). On appeal,

White does not present any argument in support of the only two causes of action expressly alleged in the complaint—i.e., negligence and unfair competition. Instead, he argues that the facts alleged in the complaint support a federal civil rights claim under title 42 United States Code section 1983 (section 1983) or, alternatively, that he should be allowed to file an amended complaint to assert such a claim.

As we explain, because White does not allege conduct by Defendants that deprived him of rights, privileges, or immunities under federal law, the trial court did not err in sustaining the demurrer. As we further explain, because White did not tell the trial court—and does not tell us on appeal—how he would amend his complaint to allege a section 1983 claim, the court did not err in denying leave to file an amended complaint. Accordingly, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND[1]

Staff at the City's central downtown library "regularly wear[] uniforms and badges that bears [*sic*] substantial similarity to the uniforms worn by members of the San Diego Police Department[.]" However, according to the first sentence of White's complaint, "[t]he state's criminal law prohibits any person from wearing or using any badge that resembles the authorized badge of a peace officer as would deceive any ordinary reasonable person into believing that it is authorized for the use of one who by law is given the

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1 Because this is an appeal following a demurrer, we are limited to and "must accept the facts pleaded as true and give the complaint a reasonable interpretation." (*Mathews v. Becerra* (2019) 8 Cal.5th 756, 762 (*Mathews*).) Under this standard, when describing or referring to the "facts," we mean the facts *as alleged* in White's verified complaint.

authority of a peace officer"—citing Penal Code section 538d, subdivision (b)(2).[2]

In making contact with White "to enforce purported rules and regulations that governs [*sic*] the public usage of library facilities and surrounding [C]ity property (e.g., putative smoking ban on a [C]ity sidewalk)," these uniformed personnel declined "to provide valid identification" when White asked for it. Had he known they were not "actual members of law enforcement," White would not have complied with "their requests"—requests which he does not describe.

According to the complaint, the "acts that gives [*sic*] rise to [Defendants'] unlawful activity is [*sic*] the enforcement of a putative City of San Diego municipal code that supposedly bans smoking around the [C]ity's property." White asserts that this unlawful activity supports causes of action for negligence and for unfair competition.[3] The negligence claim is based on White having suffered "physical, emotional, and financial harm" as a result of

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[2] Actually, White cites "Penal Code § 538(d)(2)," but based on context we understand him to mean section 538d, subdivision (b)(2), which provides in full: "Any person who willfully wears or uses any badge that falsely purports to be authorized for the use of one who by law is given the authority of a peace officer, or which so resembles the authorized badge of a peace officer as would deceive any ordinary reasonable person into believing that it is authorized for the use of one who by law is given the authority of a peace officer, for the purpose of fraudulently impersonating a peace officer, or of fraudulently inducing the belief that he or she is a peace officer, is guilty of a misdemeanor punishable by imprisonment in a county jail not to exceed one year, by a fine not to exceed two thousand dollars ($2,000), or by both that imprisonment and fine."

[3] In the same two causes of action, White also named as defendants: "Locator Services Inc. . . . doing business . . . as 'Able Patrol and Guard' " and "Six Unknown Agents doing business . . . as 'Able Patrol and Guard.' " None of these defendants is a party to this appeal.

Defendants' breach of the duty of due care in the violation of "one or more laws and regulations . . . as set forth above." The unfair competition claim is based on the City having "provide[d] merchandise" that certain unidentified "third-party vendors sell at [C]ity libraries" and/or on White having "purchased some goods and therefore . . . lost money and property." As a result of Defendants' "unlawful, unfair, and fraudulent business practices," as defined by Business and Professions Code section 17200 et seq., in the violations of "the aforementioned statutes and common law as set forth in th[e] Complaint," White suffered "various damages and injuries." Significantly, the complaint does not "set forth" any federal authorities. The laws, statutes and regulations "set forth" in the complaint are: Penal Code section 538d, subdivision (b)(2); Code of Civil Procedure sections 474, 410.10, 395, 395.5; Business and Professions Code section 17200 et seq.; and no specific section of the San Diego Municipal Code.

Defendants demurred to the complaint, arguing that neither the negligence claim nor the unfair competition claim stated a cause of action against these defendants. White filed written opposition, and Defendants replied to White's opposition. The trial court sustained Defendants' demurrer without leave to amend on the following grounds: The City, as a governmental entity, cannot be sued for common law negligence; the City is not a "person" for purposes of potential liability under Business and Professions Code section 17200, et seq.; and White did not request leave to amend.

The trial court dismissed the action without prejudice as to Defendants.[4] White timely appealed.

II. DISCUSSION[5]

In an appeal from a judgment following demurrer, we assume the truth of the allegations in the complaint and the facts that can be inferred from the allegations pleaded (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126 (*Zelig*)), and then "we examine the operative complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory" (*T.H. v. Novartis Pharmaceuticals Corp.* (2017) 4 Cal.5th 145, 162). (Accord, *Mathews*, *supra*, 8 Cal.5th at p. 762.) We review for an abuse of discretion the trial court's decision to deny leave to amend the complaint. (*Zelig*, at p. 1126.)

The trial court's judgment is "presumed to be correct." (*Jameson v. Desta* (2018) 5 Cal.5th 594, 609.) Thus, as the appellant, White has the burden of affirmatively establishing reversible error (*ibid.*), including whether the court abused its discretion in denying leave to amend following

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4 Where, as here, the dismissal is "in the form of a written order signed by the court and filed in the action," the dismissal "shall constitute [a] judgment[] and be effective for all purposes[.]" (Code Civ. Proc., § 581d.)

5 White has been representing himself throughout the proceedings. In both the trial and appellate courts, the procedural rules apply the same to a self-represented party as to a party represented by counsel, and the fact that a party is representing himself is not a basis for special treatment that would be unfair to the other litigants. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984-985 ["the rules of civil procedure must apply equally to parties represented by counsel and those who forgo attorney representation"]; *McClain v. Kissler* (2019) 39 Cal.App.5th 399, 416; see Advisory Com. com., Cal. Code Jud. Ethics, canon 3B(8).)

the sustaining of a demurrer (*Campbell v. Regents of University of California* (2005) 35 Cal.4th 311, 320 (*Campbell*); *Zelig*, *supra*, 27 Cal.4th at p. 1126).

In his opening brief, White asserts that the trial court erred in ruling (1) that the City cannot be sued for common law negligence, and (2) that the City is not a "person" for purposes of liability under Business and Professions Code section 17200 et seq. However, because White presents no further argument or authority, he has forfeited appellate review of these two points. That is because California Rules of Court, rule 8.204(a)(1)(B) requires that each point be supported "by argument and, if possible, by citation of authority"; and where a suggested error is "unaccompanied either by argument or citation of authority, . . . we are not constrained to take further notice thereof" (*Pacific States Savings & Loan Co. v. O'Neill* (1936) 7 Cal.2d 596, 598). (Accord, *In re Marriage of Falcone & Fyke* (2012) 203 Cal.App.4th 964, 1004 [we treat as " '*meritless* any issue that, although raised in the briefs, is *not supported by pertinent or cognizable legal argument or proper citation of authority*' "]; *Cahill v. San Diego Gas & Elec. Co.* (2011) 194 Cal.App.4th 939, 956 ["The absence of cogent legal argument or citation to authority allows this court to treat the contentions as waived"].) To the extent White contends that, in his reply brief on appeal, he provided additional argument or authority, we decline to consider it. (*Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 295, fn. 11 ["Obvious reasons of fairness militate against consideration of an issue raised initially in the reply brief of an appellant."]; *Golden Door Properties, LLC v. County of San Diego* (2020) 50 Cal.App.5th 467, 518, For these reasons, White has not met his burden of establishing reversible error with regard to the dismissal of the claims for negligence and unfair competition.

We now turn to section 1983.[6] To state a claim under section 1983, "a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." (*West v. Atkins* (1988) 487 U.S. 42, 48 (*West*); accord, *Julian v. Mission Community Hospital* (2017) 11 Cal.App.5th 360, 384 (*Julian*).) Section 1983 " ' "is not itself a source of substantive rights," but merely provides "a method for vindicating federal rights elsewhere conferred." ' " (*County of Los Angeles v. Superior Court* (1999) 21 Cal.4th 292, 297.) Accordingly, " '[s]tate courts look to federal law to determine what conduct will support an action under section 1983.' " (*Weaver v. State of California* (1998) 63 Cal.App.4th 188, 203; accord, *Julian*, at p. 384.) To this end, " '[t]he first inquiry in any section 1983 suit is to identify the precise constitutional violation with which the defendant is charged.' " (*Weaver*, at p. 203; accord, *Julian*, at p. 384.)

White argues first that the trial court erred in sustaining the demurrer because the complaint sufficiently alleged a section 1983 cause of action. We disagree. In his opening brief on appeal, White tells us that there are "numerous allegations in the Verified Complaint that state a cognizable claim of unconstitutional searches and seizure [*sic*] in violation of the Fourth Amendment that Mr. White was subjected to by [the City]." White provides no record references for these "numerous allegations," and our independent review of the complaint discloses none. In his reply brief on appeal, White

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6 "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ." (§ 1983.)

tells us that "[t]he complaint plainly alleges that the [City] searched him in violation of the Fourth Amendment of the Constitution"—providing as a record reference, "Verified Complaint ¶**." We consider this an acknowledgement that, in his complaint, White has *not* alleged a Fourth Amendment violation by the City.[7]

Very simply, the claims in the complaint are not based on a federal search and seizure violation; at best, they allege a state law violation for impersonating a peace officer. More specifically, the conduct White complains of is Defendants' *negligence* and *unfair competition* in the City's use of privately retained security guards who wear uniforms and badges that bear a "substantial similarity" to those worn by City police—in violation of Penal Code section 538d, subdivision (b)(2). This conduct does not involve, let alone deprive White of, a right, privilege, or immunity guaranteed by federal law (e.g., U.S. Const., art. IV), as required for a section 1983 claim. (See *West*, *supra*, 487 U.S. at p. 48; *Julian*, *supra*, 11 Cal.App.5th at p. 384.) Thus, the trial court did not err in sustaining Defendants' demurrer for failing to allege facts sufficient to state a cause of action for civil rights violations under section 1983.

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7 The complaint only mentions a search or a seizure once. In the "Introductory Statement" of the complaint, White explains that the private security guards at the downtown library, hired by the City, "wear uniforms similar to real policemen" but do not "identify themselves as being without law enforcement authorities first (i.e., 'knock and announce') eve[n] before attempting to obtain voluntary consent for *search and seizure* of members of the general public in the absence of a necessary, validly issued search warrant." (*Sic*; italics added.) Although this allegation is less than clear, it does not describe an act that arguably constitutes a search or a seizure under the Fourth Amendment.

White alternatively argues on appeal that the trial court erred in not allowing him to amend his complaint to allege a section 1983 cause of action. Since White neither requested leave to amend nor argued how he might amend the complaint, the trial court correctly ruled that he "has not indicated a basis for leave to amend." However, because White has requested leave to amend *on appeal*, our review of the trial court's ruling is not the end of the inquiry and analysis.

"If we see a reasonable possibility that the plaintiff could cure the defect by amendment, then we conclude that the trial court abused its discretion in denying leave to amend. If we determine otherwise, then we conclude it did not." (*Campbell*, *supra*, 35 Cal.4th at p. 320; accord, *Zelig*, *supra*, 27 Cal.4th at p. 1126.) " ' "The burden of proving such reasonable possibility is squarely on the plaintiff." ' " (*Graham v. Bank of America, N.A.* (2014) 226 Cal.App.4th 594, 618 (*Graham*).) "To satisfy this burden, ' "a plaintiff 'must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading' " ' by clearly stating not only the legal basis for the amendment, but also the factual allegations to sufficiently state a cause of action." (*Ibid.*; accord, *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349 (*Goodman*).) As we explain, White did not meet this burden here.

In his opening brief on appeal, White tells us that the "gravamen" of his claims are: "(1) the City had performed a search and seizure, and (2) the search and seizure was unlawful as provided under Penal Code § 538d(b)(2)." This, also, is inadequate to state a section 1983 cause of action, because it does not support a claim that the City deprived White of a right, privilege, or immunity guaranteed by federal law, as required for a section 1983 claim. (See *West*, *supra*, 487 U.S. at p. 48; *Julian*, *supra*, 11 Cal.App.5th at p. 384.)

In his reply brief on appeal, White sets forth the language of the Fourth Amendment and cites various case authorities in support of an argument that Defendants lack specified defenses to a generic section 1983 claim. In this presentation, however, White has not told us *how* he contends the City violated the Fourth Amendment or *how* he would amend his complaint to allege a cause of action under section 1983. Thus, White has not "clearly stat[ed]" either "the legal basis for the amendment" or "the factual allegations to sufficiently state a cause of action" as required to obtain leave of an appellate court to amend a complaint that was dismissed for failing to allege facts sufficient to state a cause of action. (*Graham*, *supra*, 226 Cal.App.4th at p. 618; accord, *Goodman*, *supra*, 18 Cal.3d at p. 349.)

For the foregoing reasons, White has not met his burden on appeal of establishing reversible error in the trial court's denial of leave to file a first amended complaint. (*Goodman*, *supra*, 18 Cal.3d at p. 349; *Graham*, *supra*, 226 Cal.App.4th at p. 618.)

III. DISPOSITION

The judgment of dismissal is affirmed. The City and Jones are entitled to their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(2).)

IRION, J.

WE CONCUR:

AARON, Acting P. J.

DATO, J.